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Reading Texts, Reading Traditions: African Masks and American Law

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My subject in this Essay is the relation between a text or other artifact and the tradition against which it acts. I want to begin by borrowing from a book that seems to me to represent a model—not the only model, of course, but a very good one—of a certain kind of cultural investigation. The book is *Inventing Masks* by Z.S. Strother, an art historian at Columbia University who specializes in African art.[1] Its material subject is a set of face masks made by the Central Pende, an African people in what is now the Democratic Republic of Congo.

I. THE MASKS OF THE PENDE

Even without a picture one can imagine what these masks look like: carved from dark wood, with striking eye-holes and what seem to be stylized features, painted in outline with white. I shall start by thinking of the way we would respond to such a mask if we saw it in a museum (where indeed many of them are collected). What would we make of it? We might engage in a kind of formal analysis, in terms of symmetry and asymmetry, or the balance of textures, say wood and raffia, or of its colors. We could analyze its composition in terms of contrast and harmony. All the while, almost of necessity, the mask would for most of us have the character of the exotic, the unknown. Perhaps like Freud, we would even think of it as primitive art reflecting primitive impulses obscured in our more civilized world.

We could of course compare it with other masks, from other parts

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1. Z.S. STROTHER, INVENTING MASKS: AGENCY AND HISTORY IN THE ART OF THE CENTRAL PENDE (1998).

of Africa, thus locating it in an array of possibilities. But we would not understand the significance of the differences we observed; we would not know what the mask before us meant.

What happens when such an object is contextualized more fully in the culture and tradition of which it is a part? To do this is the aim of Professor Strother's book, and it is fascinating and illuminating to see what happens as a certain type of Pende mask is located first in one aspect of its original context, then in another.

First, it turns out that the kind of mask in question is only used as part of a dance performance, one engaged in exclusively by Pende males, particularly young males eager for fame and reputation. These dances are in fact the primary way in which men compete for glory in this culture[2]—perhaps a little like football in America.

The dances are not just competitive, but take place at key moments in community life, with deep significance as community-affirming events. There is some sense that at these moments ancestors are present too, not in the dancers themselves, but beside them, or in the community as a whole.[3] So let us say that these events are in some sense of the term religious.

Professor Strother tells us in addition that the masks are actually made not by the dancer, but by a sculptor at the dancer's order, and this only after the dance has been completely choreographed, costumes designed and made, drummers found, and other musical accoutrements determined—bells on the ankles, for example, which vary in timbre and significance and contribute much to the meaning of the dance as a whole. The mask is made, that is, not as a free-standing art object, nor as a religious symbol or totem, but as part of the complex competitive cultural activity of the dance. It is made to fit the character the dancer has assumed, the kind of dance in which he will engage, the costume and the drumming he has chosen—it is the last thing made before the dance begins.[4]

How about the dances themselves? Many of them are versions of earlier-established dances, with names, based upon the character the dancer enacts, and his story. But even these dances are not rigidly traditional: The dancers take considerable pains to innovate and change, to make the dance better; this kind of transformation is in fact part of the art in which the dancer is displaying his virtuosity. Sometimes dancers will go even further, and invent completely new dances, with new characters; if these are successful, they may repeat them for years, or even decades, teaching them to younger men. If

2. *See id.* at 14-15.
3. *See id.* at 16.
4. *See id.* at 30.

these dances become part of the cultural repertoire, other dancers will borrow them and make their own innovations, all of which are subject to critical scrutiny by the community. To have invented such a dance may be the chief glory of one's life.[5]

Like the dances, the costumes are designed out of an existing repertoire—of hair styles, bracelets, foot rattles, hoops, and skins—and once more the performer will both replicate traditional patterns and innovate upon them. The costume, like the dance, is thus a cultural form to fit which the mask is designed.[6]

The masks themselves are to our eyes rather stylized, but in local understanding full of significant variation. The significance derives partly from a Pende aesthetic that seeks maximum articulation of form and movement, partly from a Pende semiotics of mask features, particularly with respect to gender. The Pende have, that is, an art of reading faces both for character and gender, and the masks must meet the criteria of that art.

This entire cultural complex, of which I am giving only the barest sketch, is the context for which the masks are made and designed; their meaning lies in the way in which they fit with and add to the type of dance, the character and his story, the music, the costume, the movements, and so forth, at once drawing their significance from their context and acting on that context, to give it new resonance and implication.

Finally, and briefly: Only when the mask has thus been seen as part of a complex genre or cultural form, at once traditional and innovative, can one begin to ask questions, as Professor Strother does, about the history of that form, including the history of the relation between innovation and tradition. She pursues this question in relation to the pre-colonial, colonial, and post-colonial stages of Pende history. Is the remarkable degree of innovation she discovers a relatively new phenomenon, or does it have its roots in the "traditional" Pende world that existed before the arrival of the French and Belgians? How were the forms of dance and mask used to respond, first to the fact of colonialism, and then to independence? To what extent, for example, were Europeans mocked and ridiculed in the dances? How has the form changed in the post-colonial condition?[7] These are questions that interest Professor Strother; for our purposes it is important that she is able to pursue them only when she has located the mask as part of a complex cultural form and practice.

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5. *See id.* at 22-43.
6. *See id.* at 45-71.
7. *See id.* at 229-63.

This is an incomplete sketch of a long and beautifully argued book, but I think that it may stand as one representation of the complex relation that exists between a cultural object and its context, or what might be called "text" and "tradition." One could read this story, that is, as illustrating the way in which meaning can be seen to consist in the relation between text and context, as a figure is seen against a ground. What we call "tradition" is the cultural dimension of context: the set of expectations that people bring to a text or other significant object—the prior texts against which it works—which in this sense contribute to its meaning.[8]

But it is not only that tradition gives meaning to the text; the text gives meaning to the tradition, by confirming or upsetting it, or transforming it. For the text invokes as important or authoritative certain parts of the ground against which it figures, and reduces or erases others.

The relation between text and tradition is thus dynamic and interactive, full of movement, actual or potential; and it is in this movement that much of the life both of the text and of the tradition can be found. The meaning of a text is thus not simply "in" the text, waiting to be apprehended, but lies in the activity of reading and understanding both text and context, an activity that the text itself stimulates; and this process is not reducible to interpretation in the usual sense, but is itself a kind of text-making, with all that this phrase implies—a gesture, if you will, in response to a gesture.

Notice that there are at least these two perspectives from which to look at this material: first, that of the viewer, for whom the layers of context define the tradition against which the mask is made, enabling him or her to see with greater—but never complete—precision and understanding what it means; and second, that of the performer, for whom the elements of the tradition I have described—the expectations of his audience—act as simultaneous constraints and enablements, the condition of his art, upon which his performance will be made.

II. THE POETRY OF EMILY DICKINSON

As a way of focusing attention upon the individual artistic component of a cultural performance, let me turn from the masks, of which I know only what I am told by Professor Strother, to a more familiar instance of cultural action, taken from the Western literary tradition.[9]

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8. I owe the phrase "prior texts" to Alton L. Becker. *See* ALTON L. BECKER, BEYOND TRANSLATION: TOWARD A MODERN PHILOLOGY, especially at 188-93, 286-90, 413-16 (1995).

9. The portion of this Essay dealing with the poetry of Emily Dickinson and a brief section

Emily Dickinson begins one of her most famous poems this way:

Because I could not stop for Death—
He kindly stopped for me—
The Carriage held but just Ourselves—
And Immortality.[10]

To begin to understand this fragment, like the mask, we would need to know something of the cultural process of which it was a part. In this case we would especially want to learn about the expectations that governed the writing of poetry in New England in the mid-nineteenth century, particularly the writing of women—which was supposed to consist of sentimental disquisitions upon a certain set of topics, including Death and Nature, cast in verse of mind-numbing regularity both in meter and rhyme.[11] This set of expectations—this tradition—constituted a force that Dickinson in some ways resisted, in others followed. It helps explain, for example, why she writes in this poem about death; why she uses the hyper-regular and sentimental verse-forms of the Congregational hymnals; why she refuses to rhyme in conventional ways, or when she does so, as here, why the rhyming has an exaggerated quality. She makes the conventions of her tradition a part of her subject and the object of her criticism.

In the course of this poem, for example, Dickinson moves from the relatively comfortable imagery of the stanza I quoted, in which Death is a kindly gentleman, neutralized by "Immortality"—in a way that makes it look as though she may be trying to be consistent with the conventions of her time—to an ending very different in feeling, when time stopped cold at the moment that she realized that "the Horses' Heads / Were toward Eternity":

Because I could not stop for Death—
He kindly stopped for me—
The Carriage held but just Ourselves—
And Immortality.

We slowly drove—He knew no haste
And I had put away

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of the portion dealing with *Brown v. Board of Education* are taken from my recent book, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION (1999), reprinted here with the kind permission of the University of Michigan Press.

10. *Because I could not stop for Death*, Poem 479 *in* 1 THE POEMS OF EMILY DICKINSON (Ralph W. Franklin ed., Belknap Press of Harvard Univ. Press, Varorium ed. 1998), at 492.

11. *See generally* CHERYL WALKER, THE NIGHTINGALE'S BURDEN: WOMEN POETS AND AMERICAN CULTURE BEFORE 1900 (1982). For further discussion of Dickinson from this perspective, see JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS 224-71 (1994).

My labor and my leisure too,
For His Civility—

We passed the School, where Children strove
At Recess—in the Ring—
We passed the Fields of Gazing Grain—
We passed the Setting Sun—

Or rather—He passed Us—
The Dews drew quivering and Chill—
For only Gossamer, my Gown—
My Tippet—only Tulle—

We paused before a House that seemed
A Swelling of the Ground—
The Roof was scarcely visible—
The Cornice—in the Ground—

Since then—'tis Centuries—and yet
Feels shorter than the Day
I first surmised the Horses' Heads
Were toward Eternity—

The effect of the poem is to transform the comfortable idea of "Immortality" into the bleak and frightening "Eternity."

Of course our questioning could go on much longer, to include, for example, the conditions of production: For whom and under what conditions were these poems made? In what form were they given physical embodiment? How do they relate to the conditions of an unmarried woman in nineteenth-century Amherst, or to one who was a child of her particular family? And so on. As with the masks, it is important to recognize that the process would never be final or complete, the meaning never perfectly retrieved. Claims of meaning are thus exactly that, claims—always tentative, never perfectly resolved.

III. American Law

To turn now to the law, I want to bring before you two items, again very briefly.

A.

First, consider the following rather inelegant sentence—the "holding" of *Brandenburg v. Ohio*—and think about what it means:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed

> to inciting or producing imminent lawless action and is likely to incite or produce such action.[12]

As lawyers we know that the meaning of this sentence is not to be found simply in its words, nor in their further formal definition, nor in their restatement into other terms. Like the mask and the poem, this sentence works out of and against a tradition, and it is only in its relation to that tradition that its meaning can be found—and then imperfectly at best.

In this case the tradition consists mainly, though not exclusively, of a set of Supreme Court and other cases, the most famous of which are probably Justice Brandeis's great opinion in *Whitney v. California*,[13] the Holmes-Brandeis dissents in *Gitlow v. New York*[14] and *Abrams v. United States*,[15] and the first struggles with the meaning of the First Amendment in the *Schenck*[16] and *Masses*[17] cases. Some of this language is very grand indeed. When we use the language from *Brandenburg* we refer not only to that particular case, decided in 1969, but to the entire past against which it is a performance—including not only the famous cases just mentioned, but less famous ones as well, and to arguments advanced elsewhere in the culture about the proper meaning of freedom of speech. Judges of course do this too, and when they ask us questions about *Brandenburg*, or any other case—*Miranda*,[18] say—we had better know that they are asking not just about the words of that text, but its relation to a tradition—a tradition that is both imperfectly knowable and in principle contested.

This helps explain too why we teach law as we do, not as a string of rules or holdings, not as a Gilbert's Outline, but as an evolving tradition: We know that the meaning of the legal text is not "in" the text, or in a restatement of it, but in the relation between the text and its contexts, in its performance against a background.

B.

I just said that the tradition was in principle contested, and it is that point I wish to pursue in connection with my second example, which consists of this famous language from *Brown v. Board of Education*:

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12. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
13. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).
14. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).
15. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).
16. Schenck v. United States, 249 U.S. 47 (1919).
17. Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).
18. Miranda v. Arizona, 384 U.S. 436 (1966).

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[19]

Like the mask—and like the poem—this is an artifact made by others, in other cultural circumstances, and the lawyer's crucial question is what it means, or what it should be said to mean. And like the other items, this one is a fragment. Our first effort will accordingly be to locate this piece in the context defined by the larger text—or series of texts—of which it is a part.

This must be done at several levels: that of the opinion itself—What is this talk about education? Does the Court really mean that segregation in public drinking fountains or rest rooms would be acceptable?—and also that of the larger legal process of which the opinion is a part, including: litigation strategies; earlier cases such as *Plessy v. Ferguson*[20] and *Sweatt v. Painter*;[21] the language of the Fourteenth Amendment itself; the debates about its adoption; the history giving rise to it; debates of the time about states' rights, about the evils of segregation; and so forth. Like the mask and the poem, the opinion can only be read as a response to its pre-existing world, against which it is a performance and to which it is shaped—as the mask is shaped to the dance and the costume, and to the larger tradition in which it occurs. This means, in turn, that the meaning of the opinion is, despite appearances, not essentially propositional but experiential in kind. It is performance against a background, and as lawyers we know that understanding it requires an attunement to that background.

The difficulties of reading the case in its original context are greatly increased when we try to bring the case into the present, and thus into a world different not only from that of the case itself but also from any that was then imagined. What is *Brown* to mean today? The promise it held out, of an integrated society within a single generation and an end to racial hatred and contempt, can now be seen as a rather hollow one. Of course many African-American students do attend integrated schools and colleges, but it cannot be denied that a great many schools are effectively segregated, though not in the first instance by law but by residential patterns.

19. Brown v. Board of Education, 347 U.S. 483, 494 (1954).
20. 163 U.S. 537 (1986).
21. 339 U.S. 629 (1950).

Furthermore, some African-Americans want to attend schools that will focus explicitly upon their own culture. This kind of proposed self-segregation on the grounds of better education greatly complicates the basic premise of *Brown*, that racial integration is an inherently good thing, especially for the excluded minority.

The particular question of present meaning that has the most bite at the moment is that of affirmative action: Is the promise of *Brown* fulfilled merely by forbidding the state to segregate by law, or does it require—or at least permit—affirmative state action to end the patterns of racial dominance and abuse that have characterized American society nearly from the beginning? Or, on the other hand, does *Brown*'s hostility toward racial classification support the view that the state should be prohibited from drawing racial lines, even those that benefit the minority?

Here I want to make an extremely sketchy suggestion, but one that will I think connect back to the mask and the poem, namely that in deciding now what *Brown* should mean we are not just interpreters but engaged, like dancers and poets, in our own performances of meaning, our own action against a cultural context or tradition, and that it is open to us, like dancers and poets, to reimagine, to reinterpret, that tradition itself.

What might that mean in this case? One might take as a starting point the Court's view in the *Slaughterhouse Cases*,[22] otherwise objectionable though that case may be, that the Fourteenth Amendment should not be regarded as authorizing a general power of judicial review of the reasonableness and propriety of state legislation, but as a text aimed at a particular problem of enormous significance, namely the consequences of our infamous system of racial slavery, just brought to an end by the Civil War. What would it mean to think of the Fourteenth Amendment, or at least its Equal Protection Clause, in such a way?

At a general level, this would be a way of imagining the Fourteenth Amendment not as an abstract statement of general principles but as constitutional action aimed at a particular social and moral problem—in common law terms, a "mischief"—all on the view that this problem should define the scope and meaning of provisions in question. It would thus put into question one of the deepest, and in many respects most valuable, assumptions that has governed the reading of the Fourteenth Amendment, namely that it should be read in the spirit of the Bill of Rights and the Declaration of Independence as a text that seeks to declare universal rights in a

22. 83 U.S. (16 Wall.) 36 (1872).

universal language, as part of a law that is seen as aspiring above all to neutrality and universality.

What would this mean in practical terms? If the point of the Civil War amendments were seen to be the enfranchisement, in every sense, of the African-American against whom the nation had committed its historic crime—and not the articulation of a more universal standard by which state action should be judged—it would be hard to hold invalid any state action rationally designed to address that problem by way of "affirmative action." Instead of "strict scrutiny," applied as though the state were on the edge of continuing to carry out its historic and noxious racist programs, there would be considerable judicial deference to any sincere and rational effort to redress or heal or recuperate the terrible consequences of human slavery. This would be a different way of thinking about this part of our Constitution, with different results in this important area.

If the views I sketch out were to be adopted, there would be serious consequences for certain aspects of current equal protection law that many of us hold dear and, even more importantly, for the larger assumptions of universality and neutrality that often seem essential to what we mean by law. I want to make clear that I am not now arguing for such results,[23] but simply wish to use this example to suggest that the lawyer, like any other cultural actor—like the dancer or poet—not only acts upon the basis afforded by his tradition but can also, at times at least, urge the redefinition or reconstitution of that tradition itself. And notice this: If I were to make this proposal in a serious way we would then argue about it; our arguments would in contrasting ways both build upon and redefine our tradition; and the meaning of what was said on both sides could not be reduced to a scheme of propositions, but, like the meaning of the mask or the poem, would lie in the nature of the performance viewed against its context.

IV. CLOSING

If the law is the kind of cultural action that I am claiming it is, what flows from this fact? Here are some thoughts; I hope each of them can be seen to derive much of its meaning from the context it has been the aim of this Essay to create.

First, the law should be talked of as an art of performance, the making of meaning against a context, or range of contexts; the

23. But if I may make just one remark: It was just these assumptions of universality and neutrality that Herbert Wechsler invoked in his famous article, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). As we all know, on such premises Wechsler found *Brown* itself somewhat dubious.

context should be seen as a necessary part of the meaning; and we should recognize that one effect of the performance may be to transform its own tradition.

Second, we should not expect that we could summarize the meaning of such a performance—a case or argument, say—in a rule or any other proposition, or that we could exhaustively state it even in more complex and sophisticated ways. The claim of meaning is always a claim, to be tested by other claims and responses; and the incompleteness or imperfection of any one claim works as a kind of openness to invention, to newness.

Third, to do law well we must learn it as a language and see its performances as performances of language. It will not do to reduce it to a string of propositions, or rules or holdings, nor, more broadly, to reduce a particular professional performance to a label such as "formalist" or "realist" either. Like the other cultural performances that I have referred to, the law cannot be reduced to or replicated in theory.

Fourth, while rules and holdings and logical claims are part of the law, their meanings, as the *Brandenburg* example is meant to suggest, are shaped by the culture within which and against which they work.

Fifth, we should recognize that the legal performance, like the dance, is profoundly communal in nature. It helps define both the legal community and the community behind it, and the community shapes the performance, through its responsive criticism.

Sixth—and perhaps most important—in our teaching of law we should recognize, as we traditionally have, that we are teaching and learning a complex set of practices and methods, ways of performing, that cannot be reduced to other terms; and also that they have much in common with other cultural forms that involve the making of a text or other work against a tradition, which it both confirms and transforms—much in common, that is, with the poetry of Emily Dickinson and the masks of the Central Pende.